# Petition

81-1587

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NO.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1981

CHARLES R. BALKCOM, WARDEN,
*Petitioner,*

v.

WILLIE FRED BATY,
*Respondent.*

**ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT (FORMER FIFTH CIRCUIT)**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether the holding of this Court in *Cuyler v. Sullivan*, 446 U.S. 335, 100 S.Ct. 1708 (1980), articulated a different standard for determining when a conflict of interest on the part of counsel constitutes ineffective assistance in violation of the Sixth Amendment of the United States Constitution, than the standard of "presumed prejudice" articulated by the United States Court of Appeals for the Eleventh Circuit (formerly Fifth Circuit)?

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**ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT (FORMER FIFTH CIRCUIT)**

## PETITION FOR WRIT OF CERTIORARI

## OPINIONS BELOW

The published opinion of the Court of Appeals for the Fifth Circuit is reported as *Baty v. Balkcom*, 661 F.2d 391 (11th Cir., former 5th) (November 16, 1981). A copy of the opinion is also attached as Appendix "A" to this brief.

## JURISDICTION

The judgment of the Court of Appeals for the Eleventh Circuit was entered on November 16, 1981. *See Baty v. Balkcom*, 661 F.2d 391 (11th Cir. 1981). A timely petition for rehearing en banc filed by the Petitioner was denied on December 17, 1981. (A copy of this denial is contained in the Appendix). Petitioner also filed a motion for a stay of

the issuance of the mandate pending this petition for a writ of certiorari which motion was granted on February 9, 1982. This petition for a writ of certiorari has been filed within the allowable ninety days of the judgment of the Court of Appeals for the Fifth Circuit. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS

Sixth Amendment, United States Constitution:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

## STATEMENT OF THE CASE

Respondent, Willie Fred Baty, was tried in the Superior Court of Newton County on the charge of armed robbery on July 11, 1977. At his trial, Respondent was represented by Mr. Charles Taylor, while his co-defendant, Leroy Miller, was represented by Mr. William D. Smith. Respondent received a life sentence for the offense of armed robbery.

Following Respondent's conviction, he was represented at a motion for new trial by Mr. John T. Strauss. A hearing on the motion was held on March 15, 1978. At this hearing, the issue of an alleged conflict of interest between Mr. Baty and his co-defendant Mr. Miller and the result-

ing substitution of counsel for Mr. Baty, was raised as an issue. In fact, Mr. Taylor, who represented the Respondent, and Mr. Smith, who represented co-defendant Leroy Miller testified at the hearing on the motion for new trial. The motion for new trial was overruled. Respondent appealed to the Court of Appeals of Georgia and that Court affirmed his conviction and sentence in *Baty v. State*, 147 Ga. App. 277 (1978). In his appeal to that Court, Respondent's counsel John T. Strauss, raised the issue of the ineffectiveness of Petitioner's trial counsel, Mr. Charles Taylor. The Court of Appeals of Georgia found that Mr. Taylor rendered the effective assistance of counsel.

Respondent next filed his application for federal habeas corpus relief under 28 U.S.C. § 2254 in the United States District Court for the Southern District of Georgia, Savannah Division. Respondent was appointed counsel on April 30, 1979. Subsequently, an evidentiary hearing was ordered before District Judge Dudley Bowen, Jr. on May 15, 1980.

The issues raised at the evidentiary hearing and in Respondent's application for federal habeas corpus relief were that he received the ineffective assistance of counsel and that a conflict of interest which arose at trial violated his right to conflict-free counsel. On August 6, 1980, the United States District Court for the Southern District of Georgia entered an order in which it was held that Respondent's trial was not rendered unfair by the ineffective assistance of counsel and that there was no actual conflict of interest at Respondent's trial and even, for the sake of argument, if an actual conflict were presumed, any such conflict did not actually affect Respondent's attorney's behavior in a way detrimental to the Respondent. On this

basis, Respondent's petition for a writ of habeas corpus was denied.

A notice of appeal was entered on behalf of the Respondent on August 15, 1980. On August 20, 1980, the United States District Court for the Southern District of Georgia certified the existence of probable cause to appeal.

Oral argument was held and on November 16, 1981, the Eleventh Circuit Court of Appeals (former Fifth) held that the petition for a writ of habeas corpus should be granted. The Court found that there was an actual conflict of interest and that there was ineffective assistance of counsel, but held that this Court's decision in *Cuyler v. Sullivan*, 446 U.S. 335 (1980), established no new standard than that earlier applied in the United States Court of Appeals for the Fifth Circuit, i.e., "presumptive prejudice" where an actual conflict of interest is shown. A petition for rehearing was denied on December 17, 1981. It is from this finding of the Eleventh Circuit as to the standard of *Cuyler v. Sullivan, supra*, and its application to this case, concerning which Petitioner now seeks a petition for a writ of certiorari from this Court.

## REASONS FOR GRANTING THE WRIT

THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT IMPROPERLY INTERPRETED THIS COURT'S DECISION IN *CUYLER V. SULLIVAN*, 446 U.S. 335, 100 S.CT. 1708 (1980), SO AS TO REQUIRE ONLY THAT AN ACTUAL CONFLICT OF INTEREST BE SHOWN, FROM WHICH PREJUDICE MAY BE PRESUMED.

Petitioner contends that the United States District Court, Southern District of Georgia, properly interpreted

and applied the decision of this Court in *Cuyler v. Sullivan*, 446 U.S. 335 (1980) and that the United States Court of Appeals for the Eleventh Circuit (former Fifth), improperly interpreted and applied this Court's decision in *Cuyler v. Sullivan, supra.* The district court noted that this Court in *Cuyler v. Sullivan*, had articulated the standard with reference to a Sixth Amendment violation based on a conflict of interest in the following language:

> "In order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance."

*Cuyler v. Sullivan*, 446 U.S. 335 (1980).

Petitioner contends that the district court was also correct in noting that the standard articulated by this Court in *Cuyler v. Sullivan, supra*, was a "newly articulated one" and effected a compromise between the former showing which was necessary, *i.e.*, only a bare conflict, and those cases in the United States Court of Appeals for the Fifth Circuit and other circuits which required that there be a showing of "actual prejudice." This Court stated in *Cuyler v. Sullivan, supra*, that unless a defendant shows that his counsel actively represented conflicting interests, he has not established a constitutional predicate for his claim of ineffective assistance. *See Cuyler v. Sullivan, supra*, at 349-50.

Therefore, Petitioner submits that the standard in *Cuyler v. Sullivan, supra*, is not the same standard which was previously applied in determining whether a Sixth Amendment violation had occurred based on a conflict of interest, but rather differs from the standard articulated in such cases as *Stephens v. United States*, 595 F. 2d 1066

(5th Cir. 1979). In *Stephens v. United States, supra,* the United States Court of Appeals for the Fifth Circuit held that if an actual conflict of interest was shown, one did not need to show prejudice. Of course, this line of cases follows the earlier decision of this Court in *Glasser v. United States,* 315 U.S. 60 (1942), in which the proposition was stated that prejudice need not be proven when there is an actual conflict of interest. However, this Court in *Cuyler v. Sullivan, supra,* while making reference to its earlier decision in *Glasser v. United States, supra,* recognized that *Glasser* stood for the proposition that unconstitutional multiple representation is never harmless error. However, at this point, this Court went further and stated:

> "Thus, a defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief. See *Holloway, supra,* at 487-491, 55 L.Ed.2d 426, 98 S.Ct. 1173. *But until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance.* See *Glasser, supra,* at 72-75, 86 L.Ed. 680, 62 S.Ct. 457."

[Emphasis supplied]. *See Cuyler v. Sullivan,* 446 U.S. 335, 100 S.Ct. 1708, 1719 (1980).

This was not the standard which was applied by the Court of Appeals for the Eleventh Circuit in this case when it stated that:

> "Once we have found an actual conflict of interest, however, we have, without further inquiry, presumed prejudice to the defendant. 'It is well established that when counsel is confronted with an actual conflict of interest, prejudice must be presumed, and except under the most extraordinary circumstances,

> the error cannot be considered harmless.' *Turnquest, supra*, 651 F.2d at 334, *see also Johnson v. Hopper*, 639 F.2d 236, 239 (5th Cir. 1981)."

*Baty v. Balkcom*, 661 F.2d 391, 395 (1981).

Petitioner respectfully submits that this "presumptive prejudice" standard has been applied before by the United States Court of Appeals for the Fifth Circuit in *Johnson v. Hopper*, 639 F.2d 236, 239.[1]

Succinctly stated, Petitioner contends that under *Cuyler v. Sullivan, supra*, there is no presumption of prejudice, but rather, it must be shown that counsel actively represented conflicting interests. Further, Petitioner contends that this Court's decision in *Cuyler v. Sullivan, supra*, overruled the numerous previous decisions of the Court of Appeals for the Fifth Circuit concluding that one does not have to show prejudice, if one can show an actual conflict of interest.

Circuit Judge Fay in a specially concurring opinion stated the following:

> "While concurring in Judge Johnson's excellent opinion, I respectfully abstain from joining in his interpretation of the holding of the Supreme Court in *Cuyler v. Sullivan*, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980). The record in this case leaves no doubt about an actual conflict of interest and that this conflict adversely affected Taylor's performance with prejudice to Baty. Having reached that conclusion, I am very hesitant to guess that the Supreme Court meant something it did not say. Indeed, as I read Justice Powell's opinion, it seems clear that a

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[1] A petition for a writ of certiorari in *Hopper v. Johnson*, filed by counsel for Petitioner in this case, No. 80-60, was denied by this Court on November 2, 1981.

> defendant must demonstrate that an actual conflict of interest adversely affected his lawyer's performance and impaired his case."

*Baty v. Balkcom*, 661 F.2d 391, 398 (11th Cir. 1981).

While Petitioner disagrees with Judge Fay's finding that the record in this case shows that an actual conflict of interest existed and adversely affected Respondent's performance with prejudice to Baty, his interpretation of *Cuyler v. Sullivan* is the correct interpretation. This case should be remanded back to the United States Court of Appeals for the Eleventh Circuit to determine if, applying the appropriate standard of *Cuyler v. Sullivan*, instead of the "presumptive prejudice" standard enunciated by that court in *Baty v. Balkcom*, 661 F.2d 391 (11th Cir. 1981) and in *Johnson v. Hopper*, 639 F.2d 236, 239 (5th Cir. 1981), habeas corpus relief should have been granted to Respondent.

## CONCLUSION

Because the United States Court of Appeals for the Eleventh Circuit utilized the "presumed prejudice" standard and misinterpreted this Court's decision in *Cuyler v. Sullivan*, 446 U.S. 335 (1980), in reversing the district court's conclusion that habeas corpus relief should be denied, a petition for a writ of certiorari should be granted to review the decision of the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I, Susan V. Boleyn, Attorney of Record for the Petitioner, and a member of the Bar of the Supreme Court of the United States, hereby certify that in accordance with the Rules of the Supreme Court of the United States, I have served three copies of the foregoing Petition for Writ of Certiorari upon the Respondent by depositing same in the United States mail, with sufficient, first class postage affixed thereto, and addressed to counsel for Respondent as follows:

Mr. Martin Pitts
Assistant Federal Public Defender
Post Office Box 2547
Augusta, Georgia 30903

This 22nd day of February, 1982.

Susan V. Boleyn

SUSAN V. BOLEYN

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**UNITED STATES COURT OF APPEALS**
**ELEVENTH CIRCUIT**
**OFFICE OF THE CLERK**
February 9, 1982

Mr. Michael J. Bowers, Attorney General
132 State Judicial Building
40 Capitol Square, SW
Atlanta, GA 30334

**No. 80-7668 BATY -vs- BALKCOM, etc.**

**CV479-101**

**MANDATE STAYED TO AND INCLUDING**

**March 17, 1982**

This Court has this day granted a stay of the issuance of the mandate to the date as shown above. If during the period of the stay there is filed with this office a notice from the Clerk of the Supreme Court that the party who has obtained the stay has filed a petition for the writ in that Court, the stay shall continue until final disposition by the Supreme Court. Upon the filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari, the mandate shall issue immediately under Rule 41, FRAP.

Under revised Rule 19.1 of the Supreme Court, effective June 30, 1980, a request to certify the record prior to action by the Supreme Court on the petition for certiorari should *not* be made as a matter of course but only when the record is deemed essential to a proper understanding of the case by that Court.

A copy of the opinion, judgment, or Rule 25 Decision, and denial of rehearing are still required by the Supreme Court to be incorporated as an appendix to your petition. Enclosed are copies of the said documents which have been entered in this cause.

Very truly yours,

NORMAN E. ZOLLER, Clerk

/s/ By: LINDA PRITT

Deputy Clerk

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE SOUTHERN DISTRICT OF GEORGIA**
**SAVANNAH DIVISION**

| | |
|---|---|
| WILLIE FRED BATY,<br>*Petitioner,*<br>v.<br>CHARLES R. BALKCOM, WARDEN,<br>GEORGIA STATE PRISON,<br>*Respondent.* | CIVIL ACTION NO. CV479-101 |

PETITION FOR A WRIT OF HABEAS CORPUS

## ORDER

Petitioner is a prisoner of the State of Georgia confined at the Georgia State Prison at Reidsville, Georgia. He is serving a life sentence imposed after a conviction for armed robbery in the Superior Court of Newton County on July 11, 1977. His conviction was affirmed by the Court of Appeals in *Baty v. State*, 147 Ga. App. 277 (1978), after a motion for new trial heard in March of 1978. Certiorari was denied by the Supreme Court of Georgia by Order dated November 7, 1978. The issues presented in this petition for relief under 28 U.S.C. § 2254 have thus been presented to the courts of Georgia as required by that statute.

Petitioner alleges his trial was rendered unfair by the ineffective assistance of counsel in violation of his rights guaranteed by the Sixth Amendment to the Constitution. Specifically, he alleges that: (1) his trial attorney did not speak to him except briefly on the morning of his trial; (2) his counsel conducted no independent investigation of the case, relying on work done by petitioner's former counsel; (3) counsel did not discuss the existence of defense witnesses with petitioner, nor did he interview the

State's witnesses; (4) counsel failed to file a motion for continuance despite the fact that a denial of such would have been grounds for new trial; (5) counsel decided against petitioner's taking the stand in his defense without prior consultation with him; and (6) petitioner was denied a fair trial because of a conflict of interest between representation of petitioner and his co-defendant.[1]

## I.

The Georgia Court of Appeals made certain findings of fact based upon the record of both the defendant's trial and the motion for new trial.[2] These are as follows:

> A robbery committed by two individuals occurred in a store in Newton County. The store owner only saw one of the individuals (later identified as defendant Baty), who knocked him down. He felt something against his head, very much like a gun, and the robber told him, "I'll blow your [g__ d__] brains out." During this incident another employee came in the store, whereupon defendant Leroy Miller, whom he had seen in the store earlier that morning, waved a gun at him and "told me to get behind the counter, get on the floor," and he was made to lie down on the floor. The two robbers proceeded to ransack the store and left, advising the store owner and employee they would blow their brains out if they came out of the store. The robbery was reported with a description given to the police that they had fled on the expressway in a car with a black vinyl top and off-white bottom, being two

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[1] This last ground was not alleged on the petition but was raised later by brief. The Court of Appeals, however, specifically discussed the alleged conflict of interest in its reported opinion.

[2] Transcripts of these proceedings are presented to this Court as respondent's exhibits one (the trial) and two (the motion for new trial).

black males, one big, the other smaller. The car was then chased by Rockdale County police in which shots were fired as soon as they were intercepted. When the chased vehicle left the expressway one of the robbers (later identified as defendant Leroy Miller) jumped from the car, aimed a pistol at the police officer, pulled the trigger and when it misfired he fled. The police officer attempted to shoot at defendant Miller with a shotgun but it misfired. Defendant Miller was later apprehended at a nearby apartment house. The chase continued as to the driver of the car (later identified as defendant Baty) who ran it into a fence and fled. Defendant Baty, as he was fleeing, fired several shots from his pistol at a uniformed state patrolman who in turn fired six shots from his M-1 carbine which then malfunctioned. He was later apprehended. Defendants Leroy Miller and Willie Fred Baty were separately indicted for armed robbery, tried jointly and convicted. We are concerned here with only the appeal of the defendant Baty, who was sentenced to life imprisonment.

During the trial only the defendant Miller took the witness stand and testified. He admitted he had been in the store to "get me a drink," had bought a drink out of the machine on the outside of the store, started walking down the street and hitchhiked a ride with another until they were chased by a police officer on the expressway who started shooting at them. He got "scared," and jumped out of the car, climbed the fence and was stopped by the police officer. His sole defense was that he did not know defendant Baty and was only riding in the car when it was chased by a police car.

Initially, both defendants were jointly represented by one lawyer who investigated the case. Approximately three or four days before trial because of the different stories the two defendants were telling, as to the circumstances surrounding the alleged crime, the sole counsel arranged with another attorney who had pre-

viously been associated with him to be prepared to act as attorney for defendant Baty if counsel was unable to obtain a severance. Counsel announced to the trial court that becuase of the possible conflict of interest he could not represent both defendants at the time of trial, that he had discussed this with the two defendants and they understood. Whereupon he proceeded to argue the motion for severance which was denied. Both were convicted.

147 Ga. App. 277, 278.

A presumption of correctness of findings of fact such as these is created by 28 U.S.C. § 2254(d).[3] The threshold for establishing this presumption is that there be an adequate written indication of the findings made by a court of competent jurisdiction and that the record from which the findings were made supports them and shows the issues involved to have been fully aired. *Thompson v. Linn*, 583 F.2d 739, 741-742 (5th Cir. 1978). These criteria have been met here in the opinion of the Court of Appeals. The transcript of the petitioner's motion for new trial certainly supports these findings. They are, therefore, adopted by this Court for use in these proceedings. 28 U.S.C. § 2254(d); *Thompson v. Linn, supra; Farmer v. Caldwell*, 476 F.2d 22 (5th Cir. 1973).

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[3] 28 U.S.C. § 2254(d) provides that the merits of a factual issue decided by a State court shall not be disturbed unless it is established or otherwise appears:

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

These facts can be augmented by evidence adduced at a hearing held by this Court May 15, 1980, and at the petitioner's motion for new trial in Newton County.[4] On the basis of this record, the Court makes the following findings of fact.

Mr. Baty was originally represented by Mr. William D. Smith. This attorney was retained by the petitioner and his co-defendant to represent them. (HT 5-6) Mr. Smith represented them in all proceedings prior to trial. (HT 8) He conducted the initial investigation, interviewed the witnesses to be used against his clients, filed a variety of pre-trial motions, reviewed the State's file on the case, mapped out the defense strategy, and appeared on behalf of both defendants at all pre-trial hearings. (HT 8, 9, 10) Mr. Smith frequently consulted and, later, formally associated a second attorney to assist him in the case. (HT 7)

This second attorney, Mr. Charles M. Taylor, eventually represented the petitioner at his trial. His initial asso-

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(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record.

*See also Townsend v. Sain*, 372 U.S. 293 (1963).

[4] The Court may consider this transcript in its determinations under the provisions of 28 U.S.C. § 2254(f). The transcript of the trial, similarly, will also be considered under this provision.

ciation with Mr. Smith on this case was of a very informal nature. (HT 7) The two attorneys had, at one time, shared office space together. (HT 7) At the time of the petitioner's trial, however, both maintained separate offices and separate law practices. (HT 32) Mr. Smith had associated Mr. Taylor on cases previously. (HT 32, 47) In this instance, Mr. Taylor was associated in the early stages of the case to assist in the legal research involved and to act as a consultant and "sounding board" to Mr. Smith. (HT 7, 11A, 17, 34) No financial arrangements were made, other than an understanding that Mr. Taylor would be reimbursed for his time at the conclusion of the trial. (HT 20, 21, 33) Mr. Taylor conducted none of the investigation, interviewed none of the government's witnesses, consulted not at all with either defendant prior to the morning of the trial. He did, however, discuss the case in all respects with Mr. Smith many times, (HT 34) and felt he was thoroughly familiar with all aspects of the crime and the case against Baty. (HT 38)He also undertook to view the scene of the events surrounding the crime. (HT 13)

We come now to the heart of the factual controversy here. At some time before trial the defendants' retained counsel, Mr. Smith, determined that a conflict of interest could arise in the event the two defendants went to trial with the same attorney. (HT 16) The conflict would have occurred because of the different versions of the events surrounding the crime being asserted by the two defendants. After discussing the matter with his clients, counsel made a motion for severance of the trials, and requested Mr. Taylor to stand by to represent one of the defendants in a separate capacity in the event the motion was denied. (HT 20-21; 39) This arrangement was communicated to

the defendants without objection by them. (HT 26-27, 36)

A preliminary hearing was held the day before trial to present the motion for severance. After the denial of the motion, Mr. Taylor undertook to defend Mr. Baty as arranged. The fee agreement discussed between the two lawyers was for Mr. Taylor to keep as much of the retainer previously paid as he thought he had earned, and for him to turn over the portion he allotted to the trial of Mr. Baty to Mr. Taylor. (HT 33) Mr. Taylor subsequently received an additional retainer for the trial work from a friend of the petitioner's. She promised to pay more at a later date. This payment was never received. (HT 40)

At this point Mr. Taylor undertook the sole representation of Mr. Baty. Prior to the date of trial he had not interviewed Mr. Baty. He had not interviewed any witnesses. He had not participated in the initial investigation. On the morning of the trial he spoke to his new client only twenty or thirty minutes. (HT 36) He was satisfied, however, with his grasp of the facts of the case and knowledge of the issues and possible defenses available. (HT 38) This security was based upon his own extensive discussions about the matter with Mr. Smith. (HT 34, 38) The two attorneys had collaborated on cases in the past, and Mr. Taylor trusted Mr. Smith's abilities to investigate the case thoroughly and to portray his findings to him accurately and fully. Mr. Taylor also, it will be recalled, had performed the legal research necessary to prepare for trial. The background provided by Mr. Smith's investigation and consultation with the petitioner included the fact that Mr. Baty had not told him of any material witnesses who could be used for the defense. (HT 36, 43)

## II.

Careful consideration of these facts requires the conclusion that the petitioner has not been denied any rights guaranteed by the Constitution; it is the conclusion of the Court that petitioner was accorded adequate representation by counsel at his trial.

Four of the six allegations made by petitioner relate to the adequacy of counsel's preparation for trial. The record shows, however, that Mr. Taylor was adequately prepared to defend Mr. Baty on the morning of trial by virtue of his extensive discussions of the case with Mr. Smith, as well as his own work done in researching the issues. The separate representation of the two defendants occurred because of anticipated events in the trial itself. Prior to that time the two attorneys were working in concert, and no reason existed for either to distrust the evaluations or representations of the other. The Court therefore deems Taylor to have been justified in his reliance upon his colleague's investigation of the case and pre-trial preparations.[5]

Taylor's familiarity with the case through his discussions with Smith obviated any need to conduct a duplicative and wasteful investigation of his own. Effective counsel need only conduct an investigation of a case to the extent necessary. *Wilkerson v. United States*, 591 F.2d 1046, 1047 (5th Cir. 1979). These same discussions made any extensive consultations with the petitioner unnecessary. Shortness of time spent with a client does not alone suffice to show ineffective representation. *Easter v. Estelle*, 609 F.2d 756, 759 (5th Cir. 1980); *Carbo v. United States*,

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[5] It might be noted, also, that petitioner does not make any specific suggestion of prejudice; he only complains that a separate investigation was not conducted.

581 F.2d 91, 93 (5th Cir. 1978); *Jones v. Henderson*, 549 F.2d 995, 997 (5th Cir. 1977), *cert. denied* 434 U.S. 840 (1977). See also *United States v. Brown*, 591 F.2d 307, 311 (5th Cir. 1979), where counsel was appointed shortly before trial. The same rational disposes of counsel's failure to interview witnesses. *Easter v. Estelle, supra.*

Mr. Taylor did not file a motion for continuance when it became clear he would have to take over Mr. Baty's defense. That a new trial might have resulted if such a motion had been made and denied does not state a reason for relief here. Counsel obviously felt such a motion was unnecessary in view of his stated readiness for trial. This was a tactical decision, one entrusted uniquely to him in his role as manager of the case. It is not the place of a federal court to second-guess every move an attorney makes at trial. Counsel is retained to exercise his best judgment in the light of his professional expertise. One may later disagree with a particular decision or stratagem, hindsight may reveal a particular judgment to have been mistaken, even show that counsel's conduct was unwise—these do not alone show ineffective assistance, merely a well-accepted human susceptibility to error. Failure of a trial tactic does not show ineffective assistance of counsel. *United States v. Johnson*, 615 F.2d 1125, 1127 (5th Cir. 1980); *Easter v. Estelle, supra*, at 759; *Cowens v. Wainwright*, 373 F.2d 34 (5th Cir. 1967); *Orr v. Schaeffer*, 460 F. Supp. 964, 968-969 (S.D. N.Y. 1978). This Court will not, therefore, scrutinize counsel's every move at trial; the record shows active, well-informed participation and representation by Mr. Taylor at trial and at sentencing.

Petitioner complains particularly that counsel denied him the opportunity to take the stand on his own behalf. The testimony shows at least partial agreement with this

tactic by petitioner. However, even if Taylor made the decision alone, he showed sound judgment in his reasoning that petitioner's taking the stand ran the risk of prior convictions being brought to the jury's attention. (HT 37, 50-51) Also, the introduction of evidence would have meant the loss of the right to conclude final arguments. Ga. Code Ann. § 27-2201. No denial of effective assistance exists in this allegation. *Mays v. Estelle*, 610 F.2d 296, 297 (5th Cir. 1980).

Last, the petitioner asserts that he was denied a fair trial because of an alleged conflict of interest in counsel's representation of him and his co-defendant. The conflict existed in the differing versions of the crime each defendant proposed to give at trial. The Court need not scrutinize any pre-trial events, as petitioner wishes, for this alleged conflict would not have affected either counsels' pre-trial acts. However, it could reasonably be speculated to have affected representation at trial, when cross-examination of a co-defendant would be crucial to the deflation of an incriminating statement. Petitioner cites the existence of conflicts as possibly affecting the zeal with which counsel would pursue a plea agreement, but the testimony was clear that this option was not available in this case. No other reason has been adduced or is evident which would have affected Mr. Smith's enthusiasm in representing one defendant in favor of the other.

Petitioner's allegation of a conflict of interest at trial depends on being able to view Mr. Taylor's prior loyalty to both defendant's together as deleteriously affecting his loyalty to the one defendant he represented at trial. An actual conflict having been shown, he asserts, relief must be granted even in the absence of a showing or prejudice.

This is certainly the law. *Holloway v. Arkansas*, 435 U.S. 475 (1978); *United States v. Risi*, 603 F.2d 1193, 1195 (5th Cir. 1979); *Zuck v. State of Alabama*, 588 F.2d 436, 439 (5th Cir. 1979); *cert. denied* ____ U.S. ____, 100 S.Ct. 63 (1979); *United States v. Alvarez*, 580 F.2d 1251 (5th Cir. 1978).

The Court opines that, in fact, no actual conflict existed. Petitioner predicates his claim on the highly speculative idea that Mr. Taylor's past obligation to work loyally for Baty's co-defendant would, after he undertook to represent Baty alone, remain in some residual form to infect his loyalty for Baty. If anything, this past representation would be advantageous to petitioner, for his counsel would be privy to the co-defendant's case and his ability to defend against a treacherous accusation by him would be enhanced. This situation might give the co-defendant a colorable conflict of interest argument, but the same is not true of Baty. Conversely, petitioner cannot allege the same argument against Mr. Smith, for he never took the stand, for independent reasons, and that obviated any opportunity for Smith to exploit his past intimacy with petitioner's defense.

However, the Court need not involve itself further in the niceties of a debate on professional ethics. A recent, more exacting standard by which to judge this situation requires that it be dismissed as a ground for relief. While actual prejudice still need not be shown, "[i]n order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest *adversely affected* his lawyer's performance." *Cuyler v. Sullivan*, Case No. 78-1832, slip op. p. 13, ____ U.S. ____, 100 S.Ct. 1708, 1718, 48 LW 4517, 4521 (1980). [Emphasis added, footnote deleted.] This language strikes a compromise between the often

impossible task of showing actual prejudice from a conflict, and the rather lenient requirement that only a bare conflict need be shown. A constitutional defect will exist only when it can be demonstrated that a conflict actually affected counsel's behavior in a way detrimental to his client.

Petitioner's case does not survive the application of this standard. Despite the existence of what is arguably an actual conflict, the evidence nonetheless shows that petitioner received adequate professional representation in the face of overwhelming evidence against him. The evidence will not bear the interpretation that counsel's performance was adversely affected by his past association in the case with Mr. Smith on the co-defendant's behalf. Baty was convicted because of the glaring evidence of his misdeeds. It is doubtful that any lawyer could have engineered an acquittal in this case. No constitutional infraction is demonstrated here.

## ORDER

The petition for the writ of habeas corpus is hereby DENIED.

Order entered at Augusta, Georgia, this 6th day of August, 1980.

/s/ DUDLEY H. BOWEN, JR.
UNITED STATES DISTRICT JUDGE

**JUDGMENT ON DECISION BY THE COURT**
**UNITED STATES DISTRICT COURT**
**FOR THE**
**SOUTHERN DISTRICT OF GEORGIA**
**SAVANNAH DIVISION**

**Civil Action File No. CV479-101**

| | |
|---|---|
| WILLIE FRED BATY<br>*vs.*<br>CHARLES R. BALKCOM, WARDEN,<br>GEORGIA STATE PRISON | JUDGMENT |

This action came on for (hearing) before the Court, Honorable Dudley H. Bowen, Jr., United States District Judge, presiding, and the issues having been duly (heard) and a decision having been duly rendered,

It is Ordered and Adjudged that in accordance with such decision the case is hereby dismissed.

Dated at Savannah, Georgia, this 8th day of August, 1980.

/s/ HENRY R. CRUMLEY, JR.
Clerk of Court

/s/ MICHAEL W. GANTT
Deputy Clerk

**UNITED STATES COURT OF APPEALS**

**ELEVENTH CIRCUIT**

**OFFICE OF THE CLERK**

December 17, 1981

TO ALL PARTIES LISTED BELOW:

**No. 80-7668—WILLIE FRED BATY v.**

**CHARLES R. BALKCOM, ETC.,**

**(Dist. Ct. No. CV-479-101)**

The enclosed order has this day been entered on petition ( ) for rehearing.

See Rule 41, Federal Rules of Appellate Procedure and Circuit Rule 27 for issuance and stay of the mandate.

Very truly yours,

NORMAN E. ZOLLER, Clerk

/s/ By: ANGELA L. BICKERS

Deputy Clerk

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE FIFTH CIRCUIT***
**UNIT B**

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**NO. 80-7668**

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WILLIE FRED BATY,
Petitioner-Appellant,
versus
CHARLES R. BALKCOM, Warden,
The Attorney General of the State of Georgia,
Respondent-Appellee.

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**Appeal from the United States District Court for the Southern District of Georgia**

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**ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC**

(Opinion November 16, 1981, 5 Cir., 198__, ___ F.2d ___).

(December 17, 1981)

Before FAY, Frank M. Johnson, Jr., and CLARK, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge of this Administrative Unit in regular active service having requested that the Court be pooled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16; Fifth Circuit Judicial Council Resolution of January 14, 1981), the suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the judges in regular active service of this Administrative Unit having been pooled at the request of one of said judges and a majority of said judges not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16; Fifth Circuit Judicial Council Resolution of January 14, 1981), the suggestion for Rehearing En Banc is also DENIED.

( ) A member of this Administrative Unit in active service having requested a poll on the reconsideration in this cause en banc, and a majority of the judges in active service of said unit not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ FRANK M. JOHNSON, JR.
United States Circuit Judge

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*Former Fifth Circuit Case; (Section 9(1) of Public Law 96-452—October 14, 1980)

**Willie Fred BATY,**
**Petitioner-Appellant,**

**v.**

**Charles R. BALKCOM, Warden, The Attorney General of the State of Georgia,**
**Respondents-Appellees.**

**No. 80-7668.**

United States Court of Appeals,
Fifth Circuit.*

Unit B

Nov. 16, 1981.

Georgia prisoner filed a petition for a writ of habeas corpus. The United States District Court for the Southern District of Georgia, Dudley H. Bowen, Jr., J., 494 F.Supp. 960, denied relief and petitioner appealed. The Court of Appeals, Frank M. Johnson, Jr., Circuit Judge, held that inadequate preparation of counsel and an actual conflict of interest on the part of counsel constituted ineffective assistance of counsel in violation of the Sixth Amendment.

Reversed and remanded.

Fay, Circuit Judge, filed a specially concurring opinion.

**1. Criminal Law 641.13(1)**

Defendant has constitutional right to counsel reasonably likely to render and reasonably rendering effective

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*Former Fifth Circuit case, Section 9(1) of Public Law 96-452-October 14, 1980.

assistance; however, effective assistance need not be errorless counsel, nor should counsel be judged ineffective solely by hingsight. U.S.C.A.Const. Amend. 6.

**2. Criminal Law 641.13(1)**

Appropriate method for determining whether there has been effective assistance of counsel is to examine totality of circumstances in entire record. U.S.C.A.Const. Amend. 6.

**3. Habeas Corpus 113(12)**

On petition for writ of habeas corpus, Court of Appeals standard for review of factual findings of district court is that Court may only overturn such findings as are clearly erroneous, but review of mixed questions of law and fact and of questions of law is much broader, allowing Court to substitute its own judgment for that of lower court. 28 U.S.C.A. § 2254(d).

**4. Criminal Law 641.13(2)**

Inadequate preparation of counsel is one ground for finding of violation of Sixth Amendment right to effective counsel. U.S.C.A.Const. Amend. 6.

**5. Habeas Corpus 113(12)**

Absent clearly erroneous determination on state prisoner's petition for writ of habeas corpus alleging ineffective assistance of trial counsel, Court of Appeals defers to district court's findings on such primary facts as determinations of what counsel did to prepare for trial or whether there was possibility of plea bargain; however, Court applies its own judgment to mixed legal and factual questions such as whether counsel's preparation for trial, given findings on how he prepared, was so minimal as to

constitute ineffective assistance, or whether counsel's continued role at trial was sufficient to constitute actual conflict of interest. U.S.C.A.Const. Amend. 6.

**6. Criminal Law 641.13(2, 6)**

Inadequate prepartion of trial counsel constituted ineffective assistance of counsel where he conducted no investigation prior to trial, apparently did not read transcript of preliminary hearing, interviewed no witnesses despite conceding that some interviews might have aided his client, communicated with his client only briefly before trial, and his minimal participation in trial as reflected by record indicated his inadequate preparation. U.S.C.A. Const. Amend. 6.

**7. Criminal Law 641.5**

For conflict of interest to cause representation to fail Sixth Amendment standards, it is required that conflict be actual, not speculative; actual conflict exists if counsel's introduction of probative evidence or plausible arguments that would significantly benefit one defendant would damage defense of another defendant whom same counsel is representing. U.S.C.A.Const. Amend. 6.

**8. Criminal Law 641.13(2)**

Once accused has shown actual conflict of interest on part of his trial counsel, there is no requirement that he prove conflict's adverse effect on counsel in order to establish counsel's ineffectiveness. U.S.C.A.Const. Amend. 6.

**9. Criminal Law 641.13(2)**

Actual conflict of interest in joint representation of two defendants constituted ineffective assistance of counsel

where, if either defendant testified at trial, he would implicate other defendant in crime while exonerating himself, defendants could have engaged in plea bargaining if they had separate counsel, and, despite presence of another lawyer ostensibly representing one of the defendants, there was in fact a joint defense. U.S.C.A.Const. Amend. 6.

**10. Criminal Law 641.5**

Though there is possibility of conflict of interest, counsel need not always avoid joint representation of defendants. U.S.C.A.Const. Amend. 6.

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Appeal from the United States District Court for the Southern District of Georgia.

Before FAY, FRANK M. JOHNSON, Jr. and THOMAS A. CLARK, Circuit Judges.

FRANK M. JOHNSON, Jr., Circuit Judge:

Willie Fred Baty appeals the district court's denial of his habeas corpus petition, 494 F.Supp. 960, claiming that he was denied at his original trial the right of effective assistance of counsel guaranteed by the Sixth Amendment.[1] We reverse.

I.

Baty and Leroy Miller, arrested for the armed robbery of a grocery store, each developed a different story, contradicting that of the other defendant, in preparation for his defense at trial. Miller asserted that he was a mere hitchhiker picked up by Baty, that he had nothing to do

[1] Through the Fourteenth Amendment, the Sixth Amendment has been made applicable to state cases such as that in which Baty initially was convicted. *See, e. g., Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963).

with the robbery, and that he did not have a gun during a gunfight with police following the robbery. In his trial testimony, Miller also placed Baty in the grocery store at the time of the robbery. Baty, on the other hand, maintained that the state had to prove that he was at the store during the robbery and that he also did not have a gun. Had he testified he would have implicated Miller in the robbery. Since each defendant would indicate that the other defendant was involved in the robbery, and since each, by asserting that he did not possess the gun introduced at trial, would necessarily imply that the other defendant had the gun,[2] testimony by either would be inconsistent with the other defendant's assertion of innocence.

Shortly after their arrest both defendants had retained William D. Smith as counsel. Smith, concluding that the contradictory stories caused a conflict of interest so severe as to render him unable to defend Baty and Miller jointly, filed a motion for severance and asked another attorney, Charles M. Taylor II, to be on "standby" in the event the court denied the motion. On the day before the trial, the court did deny the motion. Smith announced at the beginning of trial that Taylor would be counsel for Baty.

Taylor had been researching legal aspects of the case in Smith's employ[3] since shortly after defendants' arrest. Aside from a visit to the scene of the crime, Taylor's

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[2] The police recovered two guns, but only one was allowed into evidence.

[3] Taylor had at one time shared an office with Smith but had moved to his own office by the time of the trial. Taylor was paid by Smith from a portion of the fee Smith had received for Baty's defense and also received some money from a girlfriend of Baty.

familiarity with factual aspects of the case was limited to information gleaned from discussions with Smith. He interviewed no witnesses, could not recall having read a transcript of the preliminary hearing, and only talked to Baty for twenty or thirty minutes on the morning of trial. Although he later indicated that he would have been better prepared for Baty's defense had he interviewed some witnesses, Taylor did not move for a continuance.

Smith and Taylor worked closely together at trial. Trial tactics and defense were a "joint venture" and decisions as to whether Baty and Miller would testify were made by both defendants and both counsel.[4] Smith argued a motion for judgment of acquittal on behalf of Baty as well as of Miller; Smith also rested the defense of both defendants. Taylor made no opening statement on Baty's behalf. Although a major portion of Baty's defense would rely on the absence of any proof that Baty had a gun, Taylor was unaware that Miller's testimony would implicate Baty in the crime or that Miller would imply that Baty had a gun. Despite the effect of Miller's testimony on Baty's story, Taylor did not cross-examine him.

The jury found Baty guilty of armed robbery. At sentencing, after Taylor stated that he had nothing to say on behalf of his client and that his client also had nothing to say, the court imposed a life sentence. Baty,

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[4] When asked whether he had ever terminated his representation of Baty, Smith replied:

> I would say yes and no and I would have to explain this. This was a joint venture by both Defendants, the trial tactics in the trial, and the trial defense for the Defendants was also a joint effort on both parts.
>
> We all conferred during the trial as to whether or not Mr. Baty would testify, whether or not Mr. Miller would testify, depending on what the State did in their case so this was a decision made by all four parties, not severing one from the other. . . .

with new counsel, filed a motion for a new trial raising the issues of ineffective assistance of counsel and conflict of interest. The superior court denied the motion. An appeal raising the same issues also was unsuccessful. *Baty v. State*, 147 Ga.App. 277, 248 S.E.2d 503, 505-06 (1978), *cert. denied*, No. 56170 (Ga.S.Ct. November 7, 1978).

Having exhausted his state remedies, Baty filed a petition for a writ of habeas corpus, pursuant to 28 U.S.C.A. § 2254, in federal district court. Baty first charged that he received ineffective assistance of counsel because counsel did not speak to him until the morning of trial, conducted no independent investigation, interviewed no defense witnesses, failed to file a motion for continuance, and decided against having Baty take the stand without talking with him. Second, he argued that, as a matter of law, he was denied effective representation because of a conflict of interest in counsel's representing both him and Miller.

The district court denied Baty's petition. Discussion of the case with Smith, the court concluded, allowed Taylor to be prepared adequately despite the absence of other preparation or of communication with Baty; being adequately prepared, it was not ineffective assistance for counsel not to have filed a motion for a continuance. Decisions on trial tactics, the district court observed, could have been motivated by sound tactical reasons that the court declined to second-guess. The conflict of interest claims the district court also held to be without merit. The court found no reason evident why Smith might have favored one defendant over another before trial. In particular, the court found that there was no option of pursuing a plea agreement for one client or the other in this case. After mentioning that Taylor assumed sole repre-

sentation of Baty at trial, the court held that Taylor's past obligation toward Baty's co-defendant would not have adversely affected, and might even have enhanced, his representation of Baty.[5] Finally, the court noted that under the standard of *Cuyler v. Sullivan*, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980), Baty had to show an adverse effect of the conflict on his counsel's actions. There had, the court concluded, been no such effect.

Baty pursues on appeal his contentions that he was inadequately represented before trial, during trial, and at sentencing, and that a conflict of interest in the joint representation of him and his co-defendant rendered his trial fundamentally unfair.

## II.

**[1, 2]** The standard by which to evaluate the effectiveness of counsel is well established. A defendant has a constitutional right to counsel reasonably likely to render and reasonably rendering effective assistance. *See, e. g., United States v. Burroughs*, 650 F.2d 595 (5th Cir. 1981); *Washington v. Estelle*, 648 F.2d 276 (5th Cir. 1981); *Hill v. Wainwright*, 617 F.2d 375 (5th Cir. 1980); *United States v. Alvarez*, 580 F.2d 1251 (5th Cir. 1978). Effective counsel need not, however, be errorless counsel, nor should counsel

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[5] The district court stated that, under 28 U.S.C.A. § 2254(d), the state court findings of fact concerning adequacy of counsel must be presumed to be correct. This statement is contrary to *Cuyler v. Sullivan*, 446 U.S. 335, 341-42, 100 S.Ct. 1708, 1714-15, 64 L.Ed.2d 333 (1980), in which the Supreme Court held that a state court's conclusion that two lawyers had not undertaken multiple representation was a mixed determination of law and fact not falling within Section 2254(d). Similarly, determinations at issue here conerning adequacy of counsel and conflicts of interest are mixed determinations of fact and law not within Section 2254(d). *See Panzavecchia v. Wainwright*, 658 F.2d 337 at 339-40 (5th Cir. 1981); *see also* note 7, *infra*.

be judged ineffective solely by hindsight. *See, e. g., Washington v. Estelle, supra; Clark v. Blackburn,* 619 F.2d 431 (5th Cir. 1980); *Easter v. Estelle,* 609 F.2d 756 (5th Cir. 1980). The appropriate methodology for determining whether there has been effective assistance is to examine the totality of circumstances in the entire record. *See, e. g., Washington v. Estelle, supra; Lovett v. Florida,* 627 F.2d 706 (5th Cir. 1980); *United States v. Gray,* 565 F.2d 881 (5th Cir.), *cert. denied,* 435 U.S. 955, 98 S.Ct. 1587, 55 L.Ed.2d 807 (1978).[6]

[3-6] Inadequate preparation of counsel is one ground for finding a violation of the Sixth Amendment right to effective counsel,[7] *see Kemp v. Leggett,* 635 F.2d 453 (5th Cir. 1981); *Gaines v. Hopper,* 575 F.2d 1147 (5th Cir. 1978). Considered in light of the above standard, the totality of circumstances in the entire record makes clear

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[6] This Circuit until recently held that inadequacy of privately retained counsel did not violate the Sixth Amendment unless state trial court officials had actual or constructive notice of counsel's incompetence or unless the trial was so fundamentally unfair as to violate due process. *Fitzgerald v. Estelle,* 505 F.2d 1334 (5th Cir. 1974) (en banc), *cert. denied,* 422 U.S. 1011, 95 S.Ct. 2636, 45 L.Ed.2d 675 (1975). The Supreme Court overturned this rule, ending the distinction between retained and appointed counsel, in *Cuyler v. Sullivan,* 446 U.S. 335, 342-45, 100 S.Ct. 1708, 1715-16, 64 L.Ed.2d 333 (1980). *See also Perez v. Wainwright,* 640 F.2d 596 (5th Cir. 1981); *United States v. Hughes,* 635 F.2d 449, 451 (5th Cir. 1981).

[7] Our standard for review of the factual findings of the district court is that we may only overturn such findings if clearly erroneous. *United States v. Hughes,* 635 F.2d 449 (5th Cir. 1981). Our review of mixed questions of law and fact and of questions of law is much broader, allowing us to substitute our own judgment for that of the lower court. *Baker v. Metcalfe,* 633 F.2d 1198, 1201 (5th Cir.), *cert. denied,* ___ U.S. ___, 101 S.Ct. 2055, 68 L.Ed.2d 354 (1981). *See also Townsend v. Sain,* 372 U.S. 293, 309 n.6, 83 S.Ct. 745, 755 n.6, 9 L.Ed.2d 770 (1963) (distinguishing questions of fact, which concern "basic, primary, or historical facts", from mixed questions of fact and law, "which require the application of a legal standard to historical-fact determinations".)

Taylor's inadequate preparation for trial and forces us to concede the merit of Baty's claim.[8]

Taylor's minimal preparation for his client's trial must initially arouse our concern. As noted earlier, he conducted no investigation prior to trial, apparently did not read the transcript of the preliminary hearing, interviewed no witnesses despite conceding that some interviews might have aided his client, and communicated with his client only briefly before trial. Such minimal preparation might have sufficed had Taylor garnered the necessary background information from alternative sources. The record, however,

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Though earlier holdings may have intimated otherwise, *see Brown v. Blackburn*, 625 F.2d 35, 36-37 (5th Cir. 1980), we believe that *Cuyler v. Sullivan*, 446 U.S. 335, 341-42, 100 S.Ct. 1708, 1714-15, 64 L.Ed.2d 333 (1980), established that, although the determination of primary facts is subject to the clearly erroneous standard, the ultimate determination of whether those facts constitute ineffective assistance of counsel is a mixed question of fact and law. Therefore, in this case, absent a clearly erroneous determination, we defer to the district court's findings on such primary facts as determinations of what counsel did to prepare for trial or of whether there was a possibility of a plea bargain. We will, however, apply our own judgment to mixed legal and factual questions such as whether Taylor's preparation for trial, given the findings on how he prepared, was so minimal as to constitute ineffective assistance or whether Smith's continued role at trial in the defense of Baty was sufficient to constitute an actual conflict of interest.

[8] We emphasize that we have no quarrel with this Court's previous holdings that failure to conduct exhaustive investigations, to discuss a case at length with a client, or to follow certain trial tactics is not necessarily a ground for reversal. *See, e. g., Beckham v. Wainwright*, 639 F.2d 262 (5th Cir. 1981) (tactical decisions of counsel not sign of ineffective assistance because in retrospect decisions clearly wrong); *Jones v. Estelle*, 622 F.2d 124 (5th Cir. 1980) (meeting client only once prior to trial not indicative of ineffective assistance; will not, with aid of hingsight, inquire into counsel's trial tactics), *cert. denied*, ___ U.S. ___, 101 S.Ct. 537, 66 L.Ed.2d 295 (1981); *Easter v. Estelle*, 609 F.2d 756 (5th Cir. 1980) (shortness of time with client not alone sufficient to show ineffective assistance); *Wilkerson v. United States*, 591 F.2d 1046 (5th Cir. 1979) (counsel need only conduct investigation to extent necessary).

belies any claim of sufficient information from any other sources. At the least, given Smith's self-professed conflict of interest, Taylor surely should have been skeptical about exclusive reliance on Smith as a source of information. The inadequacy of that reliance is strickingly illuminated by Taylor's ignorance of aspects of Miller's testimony that might critically have undercut his own client's defense. Further evidence of Taylor's inadequate preparation can be found in his silence through and after trial when given the opportunity to make an opening statement on Baty's behalf, to cross-examine Miller, or to speak at sentencing. Although, if considered individually, these instances of silence might perhaps be ascribed to tactical judgments into which the court need not inquire, when examined cumulatively and in the context of Taylor's scanty pretrial preparation, they reinforce our conclusion that Taylor had so little familiarity with his client's case as to violate Baty's right to effective counsel.

## III.

[7, 8] For a conflict of interest to cause representation to fail Sixth Amendment standards, this Circuit requires that the conflict be actual, not speculative. An actual conflict exists if counsel's introduction of probative evidence or plausible arguments that would significantly benefit one defendant would damage the defense of another defendant whom the same counsel is representing. *See, e. g., Turnquest v. Wainwright*, 651 F.2d 331, 333 (5th Cir. 1981); *United States v. Freeman*, 619 F.2d 1112, 1121-22 (5th Cir. 1980), *cert. denied*, ____ U.S. ____, 101 S.Ct. 1348, 67 L.Ed.2d 334 (1981); *Foxworth v. Wainwright*, 516 F.2d 1072, 1076 (5th Cir. 1975). Once we have found an actual conflict of interest, however, we have, without

further inquiry, presumed prejudice to the defendant. "It is well established that when counsel is confronted with an actual conflict of interest, prejudice must be presumed, and except under the most extraordinary circumstances, the error cannot be considered harmless." *Turnquest, supra*, 651 F.2d at 334; *see also Johnson v. Hopper*, 639 F.2d 236, 239 (5th Cir. 1981). Respondent now argues, and the district court held, that the Supreme Court altered this standard in *Cuyler v. Sullivan*, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980).

In *Cuyler* two attorneys represented John Sullivan and two other defendants at different trials. After exhausting his state court remedies, Sullivan filed a habeas corpus petition alleging conflict of interest in the representation of all three defendants. The Third Circuit reversed a district court, holding that a criminal defendant's conviction may be reversed on "some showing of a possible conflict of interest or prejudice, however remote." *United States v. Cuyler*, 593 F.2d 512, 519 (1979) (*quoting Walker v. United States*, 422 F.2d 374, 375 (3d Cir.) (per curiam), *cert. denied*, 399 U.S. 915, 90 S.Ct. 2219, 26 L.Ed.2d 573 (1970)). The Supreme Court vacated the case and remanded it to the Court of Appeals in a decision, stating that "a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." 446 U.S. at 348, 100 S.Ct. at 1718.

The district court concluded that the Supreme Court's statement, though not requiring actual proof of prejudice, see 446 U.S. at 349-50, 100 S.Ct. at 1718-19, does mandate a showing not only of an actual conflict of interest but also of the adverse effect of that conflict on counsel's performance. Although the statement quoted above,

standing alone and considered independently of the remainder of the opinion, might make plausible the district court's conclusion, we believe a close examination of the opinion as a whole indicates that the Supreme Court did not intend to establish a standard requiring proof of adverse effect on counsel in addition to proof of an actual conflict of interest.[9]

Of most importance to our conclusion is language elsewhere in the opinion. Perhaps the most lucid indication of the Court's intent in pronouncing its standard may be found in its discussion with approval of an earlier holding, *Glasser v. United States*, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942): "[t]he conflict [of interest] itself demonstrated a denial of the 'right to have the effective assistance of counsel.' 315 U.S., at 76, 62 S.Ct., at 467. . . . [U]ntil a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance." 446 U.S. at 349-50, 100 S.Ct. at 1718-19. These statements seem to us to mandate the conclusion that the Court intended any active representation of interests that actually conflict to violate its standard. Further internal evidence of the Supreme Court's intent is available in the footnote immediately following the statement on which the district court relied in concluding that the Court required actual proof of adverse effect on counsel. That footnote cites several circuit court cases, including *Foxworth v. Wainwright*, 516 F.2d 1072 (5th Cir. 1975), in stating that "[a] substantial majority of the Courts of Appeals require defendants who contend that multiple

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[9] Justice Marshall, concurring in part and dissenting in part in *Cuyler*, has noted the ambiguity in the standard that the Court imposed. 446 U.S. at 358, 100 S.Ct. at 1723.

representation violated their Sixth Amendment rights to identify an actual conflict of interest." 446 U.S., at 348 n.14, 100 S.Ct., at 1718 n.14. The implication of the footnote is that the textual statement that it supports imposes a standard no different from that of the Courts of Appeals that require proof of an actual conflict.

We also note that a standard requiring a showing of adverse effect of a conflict on counsel would be contrary to the reasoning the Court employed in *Holloway v. Arkansas*, 435 U.S. 475, 490-91, 98 S.Ct. 1173, 1181-82, 55 L.Ed.2d 426 (1978): "even with a record of the sentencing hearing available it would be difficult to judge intelligently the impact of a conflict on the attorney's representation of a client. And to assess the impact of a conflict of interest on the attorney's options, tactics, and decisions in plea negotiations would be virtually impossible." [10] Although the Court in *Holloway* was considering whether to require proof of prejudice from a conflict, not whether to require adverse impact on counsel's representation, the reasoning is equally applicable to either situation. The analysis in *Holloway*, as a guide for interpreting the intent of the Court in *Cuyler*, lends support to holding that the Court did not mean to impose a standard requiring proof of adverse effect on counsel's representation.

[9] We conclude that the standard imposed by the Supreme Court in *Cuyler* is met by proof of an actual conflict of interest. As a component of that proof, of course, petitioner also must show that counsel with the conflict was representing the petitioner actively. Applying that standard to the facts of this case, we find an actual

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[10] *See also Cuyler, supra*, 446 U.S. at 356-57, 100 S.Ct. at 1722-23 (Marshall, J., concurring in part and dissenting in part).

conflict of interest that violated Baty's Sixth Amendment right to effective counsel. The very real nature of the conflict is evident and was acknowledged by Smith himself, perhaps the best judge of whether a conflict existed: [11] if either defendant testified at trial he would implicate the other defendant in the crime while exonerating himself. *See also* Lowenthal, "Joint Representation in Criminal Cases: A Critical Appraisal," 64 *Va.L.Rev.* 939, 946-48 (1978).

The district court nevertheless found no actual conflict in this case. First considering the situation before trial, the court held that in the only area in which a conflict might arise, in negotiations for a plea bargain, there was no real conflict because there was no possibility for a bargain. We find the conclusion clearly erroneous, for it is flatly contradicted by the record. Both Baty and Smith testified that a plea agreement had been offered by the state. Had he not been facing a conflict of interest, Smith might have been able to negotiate a plea agreement on Baty's behalf in return for becoming a prosecution witness against Miller. The conflict of interest before trial alone would be sufficient to grant Baty's habeas petition.[12]

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[11] "An 'attorney representing two defendants in a criminal matter is in the best position professionally and ethically to determine when a conflict of interest exists or will probably develop in the course of a trial.' " *Holloway v. Arkansas*, 435 U.S. 475, 485, 98 S.Ct. 1173, 1178, 55 L.Ed.2d 426 (1978) (quoting *State v. Davis*, 110 Ariz. 29, 31, 514 P.2d 1025, 1027 (1973)). *See also United States v. Burroughs*, 650 F.2d 595, 598 (5th Cir. 1981).

[12] We do not imply that there would have been no conflicts of interest if there were no possibility of a plea bargain. Plea bargains are perhaps the most obvious example of the manifest effects of a conflict of interest at pretrial proceedings, *see Holloway v. Arkansas*, 435 U.S. 475, 490, 98 S.Ct. 1173, 1181, 55 L.Ed.2d 426 (1978): Lowenthal, "Joint Representation in Criminal Cases: A Critical Appraisal," 64 *Va.L.Rev.* 939, 942-43, 948-49 (1978). They need not, however, be the only pretrial situation in which a conflict becomes manifest.

[10] The district court also concluded that there was no conflict of interest at Baty's trial because Taylor assumed sole responsibility for Baty's defense; any conflict arising from Taylor's earlier research on behalf of both defendants would only have redounded to Baty's benefit. Again we find the district court's conclusion clearly contradicted by the record. As noted earlier, by Smith's own admission trial tactics and defense were a "joint venture" and decisions as to whether a defendant would testify were made by both counsel and both defendants. Smith argued a motion for judgment of acquittal on Baty's behalf and rested Baty's defense. Smith's representation of Baty did not end after Taylor became "lead counsel" but, rather, continued throughout the trial.[13] This continued representation of two defendants with inconsistent stories violated Baty's Sixth Amendment right to effective

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[13] Though we previously stated our belief that a requirement of proof of adverse effect of a conflict of interest on counsel, in addition to proof of an actual conflict, was not the intent of the Court in *Cuyler*, we note that our holding would not differ even if there were a need to prove adverse effect. Taylor stated that one reason why he thought Baty should not take the stand was that he "didn't think [the defendants] could do anything but indict each other." The statement indicates that a consideration affecting the decision, a decision in which Smith admitted both counsel participated, was that Baty might implicate Miller in the crime. That concern is precisely the kind of consideration and the adverse effect feared in situations with conflicting interests.

counsel.[14] We must grant his petition for relief.[15]

The judgment of the district court is REVERSED and the case is REMANDED for proceedings consistent with this opinion.

FAY, Circuit Judge, specially concurring:

While concurring in Judge Johnson's excellent opinion, I respectfully abstain from joining in his interpretation of the holding of the Supreme Court in *Cuyler v. Sullivan*, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980). The record in this case leaves no doubt about an actual conflict of interest and that this conflict adversely affected Taylor's performance with prejudice to Baty. Having reached that conclusion, I am very hesitant to guess that the Supreme Court meant something it did not say. Indeed, as I read Justice Powell's opinion, it seems clear that a defendant must demonstrate that an actual conflict of interest adversely affected his lawyer's performance and impaired his defense.

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[14] We do not mean by this holding to suggest that counsel always should avoid joint representation. Absent actual conflicting interests we see no objection to joint representation. *See, e. g., United States v. Burroughs*, 650 F.2d 595, 598 (5th Cir. 1981); *Johnson v. Hopper*, 639 F.2d 236, 238 (5th Cir. 1979). In some instances joint representation may even be of substantial benefit to defendants: "Joint representation is a means of insuring against reciprocal recrimination. A common defense often given strength against a common attack." *Glasser v. United States*, 315 U.S. 60, 92, 62 S.Ct. 457, 475, 86 L.Ed 680 (1942) Frankforter, J., dissenting).

[15] Baty asserts that he never waived his right to effective assistance of counsel. Respondents do not contest the assertion, so we do not address it.

# Opposition

NO. 81-1587

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

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CHARLES R. BALKCOM, WARDEN,

Petitioner,

V

WILLIE FRED BATY,

Respondent.

---

ON APPEAL FROM THE UNITED STATES COURT
OF APPEALS FOR THE ELEVENTH CIRCUIT
(FORMER FIFTH CIRCUIT

---

# BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

---

Martin C. Puetz
Assistant Federal Public
Defender
Counsel of Record

Please serve:

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Post Office Box 2547
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## QUESTION PRESENTED

Whether the Eleventh Circuit's presumed prejudice standard which rests upon a finding of an actual conflict, an actual conflict being defined as counsel's introduction of probative evidence or plausible arguments which would significantly benefit one defendant while damaging the defense of another defendant whom the same counsel is representing, is the equivalent of the holding of this Court in Cuyler v. Sullivan, 446 U.S. 335, 100 S.Ct. 1708 (1980) which requires that the defendant who raised no objection at trial to demonstrate that an actual conflict adversely affected his lawyer's performance.

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ON APPEAL FROM THE UNITED STATES COURT
OF APPEALS FOR THE ELEVENTH CIRCUIT
(FORMER FIFTH CIRCUIT)

---

# BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## CONSTITUTIONAL AND STATUTORY PROVISIONS

Sixth Amendment, United States Constitution:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

Fourteenth Amendment, United States Constitution:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

## STATEMENT OF THE CASE

### COURSE OF PROCEEDINGS AND DISPOSITION IN COURTS BELOW

Respondent Willie Fred Baty [hereinafter referred to as Baty] was convicted of armed robbery after a jury trial in the Superior Court of Newton County, Georgia on July 13, 1977. The Court sentenced Baty to spend the remainder of his natural life in prison.

An evidentiary hearing on the Motion for a New Trial was held on March 15, 1973 before the Newton County Superior Court. The issues of ineffective assistance of counsel and conflict of interest were both raised. However, the motion was denied. These two issues were appealed to the Georgia Court of Appeals which affirmed Baty's conviction and sentence. Baty v. State, 147 Ga. App. 277 (1978). A rehearing was denied on September 25, 1978. The Supreme Court of Georgia denied Baty's Application for Certiorari on November 7, 1978 with one Justice dissenting.

Baty then applied to the United States District Court for the Southern District of Georgia for a Writ of Habeas Corpus pursuant to 28 USC §2254 alleging denial of his Sixth Amendment right to the assistance of counsel because of ineffective assistance of counsel and a conflict of interest. Counsel was appointed to represent Baty on April 30, 1979. Following an evidentiary hearing the District Court denied habeas corpus relief by written order entered on August 6, 1980. Notice of Appeal was duly served and timely filed on August 15, 1980. On August 20, 1980, the United States Court for the Southern District of Georgia certified the existence of probable cause to appeal.

After oral argument the Eleventh Circuit Court of Appeals reversed the District Court and granted Baty his Writ of Habeas Corpus. The Court found, based upon a totality of the circumstances that Baty was denied effective assistance of counsel

because of inadequate preparation for trial by his attorney. The Court further found that Baty's Sixth Amendment right to the assistance of counsel was violated by an actual conflict of interest.

## STATEMENT OF FACTS

Baty and Leroy Miller were arrested for armed robbery of a grocery store. Soon after their arrest both Baty and Miller retained William D. Smith to represent them. Smith concluded early on that the contradictory stories of each defendant presented a clear conflict for him and he filed a motion for a severance. However, this motion was not heard until the day before trial. Mr. Smith, anticipating that the motion would be denied, asked another attorney, Mr. Charles Taylor, II, to be on standby to represent Baty.

Taylor had previously shared office space with Smith, but at the time of trial he had his own office. Taylor's knowledge of the case was based upon discussions with Smith. Taylor had also researched some of the issues in the case for Smith. Taylor did not interview any witnesses prior to trial, did not read the transcript of the preliminary hearing and discussed the case with Baty for only twenty minutes on the morning of the trial. Taylor did not move for a continuance which would have permitted time to interview the witnesses.

Though a plea agreement had been offered by the State, Smith did not pursue it in behalf of either Baty or Miller because of the conflicting stories of each defendant.

At the beginning of the trial Smith announced that Taylor would represent Baty. In spite of this, Smith and Taylor conducted the trial as a "joint venture" and decisions regarding who was going to testify were made by both defendants and both counsel. Smith acted as lead counsel for both Baty and Miller throughout the trial. He argued a Motion for Judgment of

Acquittal on behalf of both defendants and rested the case of both defendants; whereas, Taylor made no opening statement on behalf of Baty and at sentencing made no statement in behalf of his client. Taylor was also unaware that co-defendant Miller would implicate Baty and after Miller's direct testimony, Taylor did not even cross-examine him.

## REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT REQUIRES THAT A CONFLICT OF INTEREST BE ACTUAL WHICH, BY DEFINITION, REQUIRES THE DEFENDANT TO DEMONSTRATE THAT THE ACTUAL CONFLICT OF INTEREST ADVERSELY AFFECTED HIS LAWYER'S PERFORMANCE IN COMPLIANCE WITH CUYLER V. SULLIVAN, 446 U.S. 335, 100 S.CT. 1708 (1980).

In Cuyler v. Sullivan, 446 U.S. 335, 100 S.Ct. 1708 (1980) this Court held:

> "Thus, a defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief. See Holloway, supra, at 487-491, 55 L.Ed.2d 426, 98 S.Ct. 1173. But until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance. See Glasser, supra, at 72-75, 86 L.Ed. 680, 62 S.Ct. 457."

Id. at 348, 100 S.Ct. at 1719.

In the wake of Cuyler the primary focus is whether or not an actual conflict of interest adversely affected the lawyer's performance. The defendant does not need to demonstrate prejudice.

The United States Court of Appeals for the Eleventh Circuit (Former Fifth) has long required that the conflict be actual and not speculative. An actual conflict is one where counsel's introduction of probative evidence or plausible arguments would significantly benefit one defendant and would damage the defense of another defendant whom counsel is simultaneously representing. See, e.g., Balkcom v. Baty, 661 F.2d 391, 395, (5th Cir. 1981); Turnquest v. Wainwright, 651 F.2d 331, 333 (5th Cir. 1981); United States v. Freeman, 619 F.2d 1112, 1121-22 (5th Cir. 1980), cert. denied - U.S. -, 101 S.Ct. 1348, 67 L.Ed. 2d 334 (1981); Foxworth v. Wainwright, 516 F.2d 1072,

1076 (5th Cir. 1975). This definition of an actual conflict assures that there will be an adverse affect upon the lawyer's performance in representing one of his clients. As stated by the Court in Baty the standard imposed in Cuyler is met by proof of an actual conflict of interest. Balkcom v. Baty, 661 F.2d 391, 397 (5th Cir. 1981). Nor does the presumption of prejudice contradict Cuyler because the definition of an actual conflict utilized by the United States Court of Appeals of the Eleventh Circuit is so restrictive and the presumption rests upon a finding of an actual conflict.

In the case at bar an actual conflict of interest existed both pretrial and during the trial itself. Prior to trial Smith did not attempt to negotiate a plea agreement which was offered to Baty because Baty's testimony would implicate Miller. It is beyond contradiction that this conflict of interest adversely affected Smith's representation of Baty. During the trial Smith along with Taylor represented Baty and this continued representation of two defendants whose stories conflicted adversely affected Smith's representation of each. Miller was allowed to testify and was not cross-examined and implicated Baty. Baty was not placed upon the stand for fear that his testimony would be damaging to Miller and would implicate him. Again, this actual conflict adversely affected Smith's representation of Baty.

## CONCLUSION

For the foregoing reason, Respondent respectfully requests that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

Martin C. Puetz
Assistant Federal Public Defender
Counsel of Record

## CERTIFICATE OF SERVICE

I, Martin C. Puetz, Attorney of Record for the Respondent, hereby certify that in accordance with the Rules of the Supreme Court of the United States, I have served three copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari upon the Petitioner by depositing same in the United States mail, with sufficient, first class postage affixed thereto, and addressed to counsel for Petitioner as follows:

Susan V. Boleyn
Assistant Attorney General
132 State Judicial Building
40 Capitol Square, S. W.
Atlanta, Georgia 30334

This 10th day of May, 1982.

Martin C. Puetz

RECEIVED
MAY 13 1982
OFFICE OF THE CLERK
SUPREME COURT, U.S.

NO. 81-1537

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

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CHARLES R. BALKCOM, WARDEN,

Petitioner,

V

WILLIE FRED BATY,

Respondent.

---

ON APPEAL FROM THE UNITED STATES COURT
OF APPEALS FOR THE ELEVENTH CIRCUIT
(FORMER FIFTH CIRCUIT)

---

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

---

Martin C. Puetz
Assistant Federal Public
Defender
Counsel of Record

Please serve:

Martin C. Puetz
Assistant Federal Public Defender
Post Office Box 2547
Augusta, Georgia 30903
(404) 722-5394

IN THE

SUPREME COURT OF THE UNITED STATES

| | | |
|---|---|---|
| CHARLES R. BALKCOM, WARDEN, Petitioner, | ) | |
| V | ) | NO. 81-1587 |
| WILLIE FRED BATY, Respondent. | ) | |

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

COMES NOW WILLIE FRED BATY, Respondent, by and through his court appointed attorney, Martin C. Puetz, Assistant Federal Public Defender for the Southern District of Georgia and moves this Court for leave to proceed in forma pauperis and shows the Court the following:

1. On April 30, 1979, the office of the Federal Public Defender was appointed to represent Respondent in the above-captioned matter pursuant to the Criminal Justice Act of 1964 as amended. (See Exhibit "A".)

2. Respondent has been represented by the office of the Federal Public Defender throughout the proceedings in the Courts below.

3. Respondent files along with this Motion his Brief in Opposition to Petition for Writ of Certiorari.

WHEREFORE Respondent respectfully requests that this Motion be inquired into and the same be granted.

Respectfully submitted,

Martin C. Puetz
Assistant Federal Public Defender

U[ TED STATES DISTRICT C.
SOUTHERN DISTRICT OF GEORGIA

Savannah Division

UNITED STATES OF AMERICA

VS.

Willie Fred Baty

MD____ CN _____

District No. CV 479-101

ORDER APPOINTING COUNSEL

The above named defendant has testified under oath, and has hereby satisfied this court that he or she is financially unable to employ counsel.

Accordingly the Federal Public Defender, R. Jackson B. Smith, Jr. Suite 401, New South Building, 360 Bay Street, Augusta, Georgia, 722-5394, is hereby appointed to represent this defendant in the above designated case unless relieved by an order of this court or by order of the court of appeals.

DATE: April 30, 1979

UNITED STATES MAGISTRATE

(9)

EXHIBIT "A"

RECEIVED

AUG 2 6 1979

FEDERAL PUBLIC DEFENDER
SOUTHERN DISTRICT OF GEORGIA